

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 74-1217

UNITED STATES OF AMERICA,

Appellee,

—against—

SAUL M. KOHN,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellant Saul M. Kohn appeals from a judgment of conviction of the United States District Court for the Eastern District of New York (Mark A. Costantino, J.), entered on February 1, 1974, after a non-jury trial, which judgment convicted appellant of possession, with intent to distribute, of approximately thirteen pounds of hashish, in violation of Title 21 United States Code, § 841(a)(1). This conviction was on Count Three of a four count indictment. Appellant was acquitted of three remaining counts.*

* Count One charged appellant with aiding and abetting the importation of hashish, in violation of Title 21 United States Code, § 952(a), § 960(a)(1) and Title 18 United States Code, § 2.

Count Two charged appellant with aiding and abetting the possession of hashish on board an aircraft arriving in the United States, in violation of Title 21 United States Code, § 955, § 960(a)(2) and Title 18 United States Code § 2.

Count Four charged appellant with conspiracy to import hashish into the United States, in violation of Title 21 United States Code, § 952(a) and § 963.

On February 1, 1974, appellant was sentenced to the custody of the Attorney General to a term of three years, six months of which was to be served, with the remaining two and one-half years suspended. He was placed on probation for the suspended portion of the sentence and further sentenced to five years special parole. Appellant has been released on bail pending this appeal.

On this appeal, the two issues presented deal with the seizure of certain contraband at the time of appellant's arrest. The first issue deals with whether part of the seized property was in "plain view" when appellant was arrested in his apartment. The second issue is whether or not appellant's consent to search a closet was voluntarily given.

Statement of Facts

In a Memorandum Decision, dated November 12, 1973, Judge Costantino found the following facts:

On February 8, 1973, Trevor A. Walters, a British subject, arrived at John F. Kennedy International Airport from Tangiers, Morocco (S. 6).^{*} When he arrived at Customs, his bags were opened and a quantity of hashish was discovered hidden beneath a false bottom (S. 14). Walters was placed under arrest by Customs agents and interviewed (S. 20). He told the arresting agents that he was being paid \$2,000 to bring the valises containing the hashish into the United States, by a man he knew only as "Michael" (S. 18). Walters explained that Michael had given him a slip of paper bearing the name "Saul Kohn" and an address in New York City. His instructions, from "Michael", were to deliver the luggage to the man named on the piece of paper and be paid by him (S. 19). Walters agreed to cooperate with the agents. At the request of

^{*}Page references preceded by "S" refer to transcript of the suppression hearing.

the agents Walters telephoned appellant and made arrangements to deliver the valises. The call was recorded (S. 23-7).

Walters was then driven, with one of the hashish-laden suitcases, to the address on the slip of paper. He was instructed to deliver the bag as planned. When Walters arrived at the apartment he was admitted by the appellant (S. 31). After a few pleasantries were exchanged, Walters advised appellant that he had just arrived from Morocco with a shipment of hashish. He asked appellant whether he intended to sell the contraband, to which appellant responded by saying "maybe" (S. 34).

While Walters was in the apartment with appellant, the suitcase was opened but nothing was removed (S. 35). Walters then left the apartment and met with Customs agents and told them what had happened (S. 35).

Upon receiving this information, Special Agent Walsh knocked on the door of appellant's apartment, identified himself, and was admitted by appellant. Appellant was immediately arrested, advised of his rights. Appellant stated that he knew the law and understood his rights (S. 63-64).

Agent Walsh testified that he then noticed a small amount of hashish on a table in the living room where the two men were standing. Appellant readily admitted that it was his own (S. 64).

At approximately this time, appellant began complaining that the agents had "no right to be there" and that this incident was just one more example of the "totalitarian government infringing upon people's rights to be free and happy" (S. 89). After appellant calmed down, Agent Walsh asked him for the suitcase brought by Walters. Mr. Kohn asked if the agents had a search warrant, to which

they responded in the negative. They further advised him that they had every right to get one, but that to do so at that late hour would necessitate securing the premises until the following morning (S. 90).^{*} Appellant responded to this by saying "I don't care what you do, just do what you have to do" (S. 90). Agent Walsh then asked him where the suitcase was. Appellant pointed towards a closet and said "the bag is in the closet" (S. 90). The bag was retrieved from the closet, opened, and the hashish was seized.

Appellant moved to suppress the hashish found on his living room table and the hashish contained in the valise delivered by Walters.**

ARGUMENT

POINT I

The decision of the District Court denying appellant's motion to suppress the hashish found on the table was proper.

It is well settled that evidence observed in "plain view" may be seized, even without a search warrant, so long as certain circumstances exist justifying the exception to the basic rule that searches shall be made pursuant to warrants whenever possible. *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971). In order for the agents to avail themselves of this "plain view" exception the observation of the contraband must be "inadvertant" and not the result of a contrived search. *Coolidge v. New Hampshire, supra*, at

^{*} Appellant's arrest took place at approximately 9:45 P.M.

^{**} After his arrest, Kohn stated that he was a marijuana salesman (S. 96). He later repeated this to a secretary in the offices of the United States Attorney, and to the arraigning magistrate when they inquired about his occupation (S. 96, 98). These statements were suppressed by Judge Costantino (S. 98).

466. The seizure must be attendant to an "exigent circumstance" which initially alleviates the necessity of a warrant. Both these prerequisites exist in the case now before this Court.

The courier Walters completed his controlled delivery to Kohn at approximately 9:45 P.M. on the evening of February 8, 1973. At that moment, the Customs agents knew that the contraband was to be found in appellant's apartment. They were faced with the following choice: Either leave the building, wait until morning to secure a warrant and return with it approximately twelve hours later, or act summarily. If they waited they ran the substantial risk of having the evidence lost or destroyed, as frequently occurs in narcotics cases. If they acted immediately, they would be able to effect a legitimate and proper arrest and most importantly, they would seize and secure the contraband. They correctly opted for the second choice.

Under these obviously exigent circumstances, the agents were duty-bound to act immediately. Agent Walsh knocked on the door and identified himself (S. 87). He was admitted to the apartment by the appellant at approximately 9:30 P.M. (S. 88). He then placed Mr. Kohn under arrest for violation of federal narcotics laws. No guns were displayed. No force was used. After advising the appellant of his rights, Agent Walsh looked around and saw a quantity of hashish on a table (S. 64). He asked Kohn about it and received the reply that it was his and that he had been smoking it before the agents arrived. The agents did not have to "search" for this evidence. It was right there in front of them. Their presence in the room was proper. They had been admitted voluntarily and were making a valid arrest based on probable cause. Their movement into the interior of the apartment was obviously responsible action undertaken to secure the premises and prevent the possible destruction of evidence.

Judge Costantino properly denied appellant's motion to suppress this evidence.

POINT II

Seizure of the suitcases was based upon appellant's voluntary consent.

It is clear from the facts of this case, as adduced at trial and found by the District Court, that the appellant voluntarily consented to a search of his closet, which search resulted in the seizure of the hashish-filled valise. (Memorandum Decision, November 12, 1973, at 8.)

To reiterate, at the time of appellant's arrest the Customs Agents were admitted to appellant's apartment peacefully and no weapons were employed or displayed during the arrest. Appellant was immediately advised of his constitutional rights. After the hashish was discovered and seized from the living room table, appellant was asked for the suitcase which was delivered just moments before by the courier Walters. He responded by asking whether the agents had a search warrant for the premises. They quite properly responded that they did not, but that they could easily secure one on the following morning. They further advised appellant that to obtain a warrant they would be required to secure the premises by leaving agents in residence overnight.* In response, appellant simply said, "I don't care what you do, just do what you have to do." Appellant then pointed to the closet and assured the agents that "the bag is in the closet." The evidence was then seized.

The evidence shows that the Government sustained its burden of showing that appellant's consent was knowingly

* It could, of course, be argued alternatively that the agents were entitled to thoroughly check the apartment including closets in their efforts to secure the premises and guarantee their safety and the preservation of all evidence.

and voluntarily given. *Bumper v. North Carolina*, 391 U.S. 543 (1968). Appellant knew that the agents had effected a controlled delivery of the contraband through the cooperating co-defendant Walters. Simply stated, he had been caught red-handed, and he "knew the jig was up", and more likely than not, he realized that his insistence upon a search warrant could in no way benefit him. *United States v. Kuntz*, 265 F. Supp. 543 (N.D.N.Y. 1969). As Judge Costantino concluded in denying the motion to suppress:

The inescapable conclusion must be that while the words as set down in black and white may appear equivocal, their meaning at the time was crystal clear to all present. Had Kohn not meant that the agents were free to search, surely he would have protested. He had previously demonstrated no reticence about speaking his mind to the agents.

(Memorandum Decision, November 12, 1973, at 7.)

A comparison with this Court's recent decision in *United States v. Mapp*, 476 F.2d 67 (2d Cir. 1973) sheds considerable light on the question of appellant's consent to search. In *Mapp*, a unanimous Court declined to find voluntary consent on the part of one Mrs. Walters, concluding that "this case presents incident of submission to official authority under circumstances pregnant with coercion."

United States v. Mapp, 476 F.2d at 77. Chief Judge Kaufman observed:

"Under these extraordinary circumstances—a gun in hand, a breaking down of the door, an arrest, the hour (2:00 A.M.), the place (her bedroom)—the officers' failure to warn Mrs. Walters, after placing her under arrest, of her right to remain silent or to withhold consent to a search, takes on special significance." *Id.* at 78.

In the case now before this Court, the circumstances presented are decidedly different. Appellant was arrested at approximately 9 o'clock after he answered the agent's knock on his apartment door. No force was shown or armed strength was necessary or employed. He was immediately advised of his rights and he was impliedly advised that the agents needed a search warrant in the absence of his consent. The entire incident took place in his living room where he was advised that the agents had in fact accomplished a controlled delivery of the contraband. The entire procedure took only a matter of minutes. The agent's request for the valise was in no way a "demand" as in *Mapp* and in fact the agent testified that had appellant not consented to the search he would have employed his only alternative and secured a warrant.

The facts of this case demonstrate that the Government fulfilled its burden of showing that appellant Kohn's consent was freely and voluntarily given.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

May 3, 1974

EDWARD JOHN BOYD, V,
United States Attorney,
Eastern District of New York.

RAYMOND J. DEARIE,
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Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

LYDIA FERNANDEZ _____, being duly sworn, says that on the 6th
day of May 1974 _____, I deposited in Mail Chute Drop for mailing in the
U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and
State of New York, two copies of the brief for the appellee
of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper
directed to the person hereinafter named, at the place and address stated below:

Aaron R. Schacher, Esq. _____

32 Court Street _____

Brooklyn, New York 11201 _____

Sworn to before me this
6th day of May 1974

Frances A. Grant

FRANCES A. GRANT
Notary Public, State of New York
No. 41-4503731
Qualified in Queens County
Commission Expires March 30, 1975

Lydia Fernandez
LYDIA FERNANDEZ



SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,
_____, 19____

United States Attorney,
Attorney for _____

To:

Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____ duly entered herein on the ____ day of _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,
Dated: Brooklyn, New York,
_____, 19____

United States Attorney,
Attorney for _____

To:

Attorney for _____

----- Action -----

No. -----

UNITED STATES DISTRICT COURT
Eastern District of New York

-----Against-----

United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____
is hereby admitted.

Dated: _____, 19____

Attorney for _____

